Attorney's Docket No. 5577-337/RSW920010175US1   PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE ··

In re: Bell *et al.*   Confirmation No.: 5106
Serial No.: 10/042,794   Group Art Unit: 2122
Filed: January 9, 2002   Examiner: John J. Romano
For: **EFFICIENT CONFIGURATION DATA MIGRATION TECHNIQUE**

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Commissioner for Patents
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Alexandria, VA 22313-1450

TRANSMITTAL OF APPEAL BRIEF
(PATENT APPLICATION—37 C.F.R. § 41.37)

1.   Transmitted herewith is the APPEAL BRIEF for the above-identified application,
pursuant to the Notice of Appeal filed on September 2, 2005.
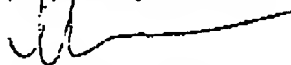
2.   This application is filed on behalf of
       ☐   a small entity.

3.   Pursuant to 37 C.F.R. § 41.20(b)(2), the fee for filing the Appeal Brief is:
       ☐   small entity $250.00
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            09-0461.

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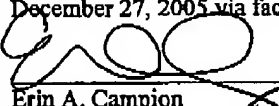Filed: January 9, 2002   Examiner: John J. Romano
For: **EFFICIENT CONFIGURATION DATA MIGRATION TECHNIQUE**

Date: December 27, 2005

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APPELLANTS' BRIEF ON APPEAL UNDER 37 C.F.R. § 41.37

Sir:

This Appeal Brief is filed pursuant to the "Notice of Appeal to the Board of Patent
Appeals and Interferences" mailed September 2, 2005 and the Decision from the Appeal Brief
Conference mailed from the United States Patent Office on October 24, 2005.

Real Party In Interest

The real party in interest is assignee International Business Machines Corporation,
Armonk, New York.

Related Appeals and Interferences

Appellants are aware of no appeals or interferences that would be affected by the present
appeal.

Status of Claims

Appellants appeal the final rejection of Claims 1-31, which as of the filing date of this
Brief remain under consideration. The attached Appendix A presents the claims at issue as
finally rejected in the Final Office Action of June 2, 2005 (hereinafter "Final Office Action") and
the Advisory Action of August 25, 2005 (hereinafter "Advisory Action").

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Status of Amendments

The attached Appendix A presents the pending claims and each of the pending claims' corresponding status. The Appellants' Amendment After Final of August 2, 2005 not entered, thus, Appellants appeal Claims 1-31 at issued before the Amendment After Final was filed in the present case.

Summary of the Claimed Subject Matter

The present application includes rejected independent Claims 1, 10, 18 and 19. The claims are method, computer program product and system claims. Independent Claim 1 is directed to a method of migrating configuration data from a first executable product to a second executable product. Such a method may be provided by instructing, from an external agent, the first executable product to provide a file containing selected configuration data. *See* Specification, page 8, lines 6-8. The first executable product may produce the file containing the selected configuration data in a format acceptable to the second executable product. See Specification, page 8, lines 10-11.

Independent Claim 10 is a computer program product for migrating configuration data from a first executable code to a second executable code. Such as computer program product may include computer readable storage medium having computer readable program code embodied in said medium. The computer readable program code may include computer readable program code configured to receive a command from an external agent and computer readable program code configured to obtain, responsive to the received command, configuration data available to the first executable code which is useful to the second executable code. *See* Specification, page 8, lines 6-9. Computer readable program code is provided that is configured to arrange the data according to a format usable by the second executable code. *See* Specification, page 8, lines 10-11. Computer readable program code is provided that is configured to write the data to one or more external media for access by the second executable code. *See* Specification, lines 11-13.

Independent Claim 18 is a computer program product for migrating configuration data used by a first computer process to a second computer process requiring a set of data arranged in a format. The computer program product may be embodied on one or more computer-readable

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media. The computer readable media may include computer-readable program code configured to respond to a command presented by an external agent to produce a file according to the format, the file containing selected configuration data, the computer-readable program code configured to respond being contained in the first computer process. *See* Specification, page 8, lines 6-11. Computer-readable program code configured to output the file to a selected location is provided. The computer-readable program code configured to output being contained in the first computer process. *See* Specification, page 8, lines 11-14. Computer-readable program code configured to read the file from the selected location is provided. The computer-readable program code configured to read being contained in the second computer process. See Specification, page 9, lines 6-10.

Independent Claim 19 is a system corresponding to Claim 1.

Grounds of Rejection to Be Reviewed on Appeal

1.   Claims 1-3, 7-11, 14-16, 18-20, 24-26 and 28 are rejected under 35 U.S.C. § 102(e) as being anticipated by United States Patent No. 6,728,877 to Mackin *et al.* (hereinafter "Mackin").

2.   Claims 12, 13 and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mackin in view of United States Patent No. 5,969,704 to Green *et al.* (hereinafter "Green").

3.   Claims 4, 6, 21 and 22 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mackin in view of United States Patent No. 6,757,720 to Weschler (hereinafter "Weschler").

4.   Claims 5 and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mackin in view of Weschler and in further view of obviousness.

5.   Claims 29, 30 and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mackin in view of United States Patent No. 6,430,622 to Aiken (hereinafter Aiken).

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Argument

I. Introduction

Claims 1-3, 7-11, 14-16, 18-20, 24-26 and 28 are rejected under 35 U.S.C. § 102. Under 35 U.S.C. § 102, "a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." M.P.E.P. § 2131 (quoting *Verdegaal Bros. v. Union Oil Co.*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987)). "Anticipation under 35 U.S.C. § 102 requires the disclosure in a single piece of prior art of each and every limitation of a claimed invention." *Apple Computer Inc. v. Articulate Sys. Inc.*, 57 U.S.P.Q.2d 1057, 1061 (Fed. Cir. 2000). "The fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result or characteristic. To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" M.P.E.P. § 2112 (citations omitted).

A finding of anticipation further requires that there must be no difference between the claimed invention and the disclosure of the cited reference as viewed by one of ordinary skill in the art. *See Scripps Clinic & Research Foundation v. Genentech Inc.*, 927 F.2d 1565, 1576, 18 U.S.P.Q.2d 1001, 1010 (Fed. Cir. 1991). In particular, the Court of Appeals for the Federal Circuit held that a finding of anticipation requires absolute identity for each and every element set forth in the claimed invention. *See Trintec Indus. Inc. v. Top-U.S.A. Corp.*, 63 U.S.P.Q.2d 1597 (Fed. Cir. 2002). Additionally, the cited prior art reference must be enabling, thereby placing the allegedly disclosed matter in the possession of the public. *In re Brown*, 329 F.2d 1006, 1011, 141 U.S.P.Q. 245, 249 (C.C.P.A. 1964). Thus, the prior art reference must adequately describe the claimed invention so that a person of ordinary skill in the art could make and use the invention.

The remaining claims stand rejected as obvious under 35 U.S.C. § 103. To establish a prima facie case of obviousness, the prior art reference or references when combined must teach or suggest *all* the recitations of the claims, and there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary

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skill in the art, to modify the reference or to combine reference teachings. M.P.E.P. §2143. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. M.P.E.P. §2143.01, citing *In re Mills*, 916 F.2d 680, 16 U.S.P.Q.2d 1430 (Fed. Cir. 1990). As emphasized by the Court of Appeals for the Federal Circuit, to support combining references, evidence of a suggestion, teaching, or motivation to combine must be **clear and particular**, and this requirement for clear and particular evidence is not met by broad and conclusory statements about the teachings of references. *In re Dembiczak*, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999). The Court of Appeals for the Federal Circuit has further stated that, to support combining or modifying references, there must be **particular** evidence from the prior art as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed. *In re Kotzab*, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000).

Appellants respectfully submit that the pending claims are patentable over the cited references because the cited references fail to disclose or suggest the recitations of the pending claims and/or the reasoning behind the alleged motivation to modify the cited reference has not been established.

The Section 102 Rejections

A.   **Independent Claims 1, 10, 18 and 19 are Patentable over the Cited Reference**

Claims 1-3, 7-11, 14-16, 18-20 are rejected under 35 U.S.C. § 102(e) as being anticipated by United States Patent No. 6,728,877 to Mackin *et al.* (hereinafter "Mackin"). Appellants respectfully submit that many of the recitations of these claims are neither disclosed nor suggested by Mackin. For example, Amended Claim 1 recites:

> A method of migrating configuration data from a first executable product to a second executable product, the method comprising:
> instructing, **from an external agent,** the first executable product to provide a file containing selected configuration data; and
> producing, by the first executable product, the file containing the selected configuration data in a format acceptable to the second executable product.

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Independent Claims 10, 18 and 19 contain similar recitations to the highlighted recitations. Appellants submit that at least the highlighted portions of Amended Claim 1 are neither disclosed nor suggested by the cited combination.

Claim 1 has been amended to incorporate the recitations of dependent Claim 3, namely, "the external agent." The Office Action states, with respect to Claim 3, that Mackin teaches this recitation at column 8, lines 9-12. The cited portion of Mackin states:

> An OLE or ActiveX control is an object that accepts and responds to events, such a selection by a mouse or a key on a keyboard, or a selection by another object-oriented member function.

See Mackin, column 8, lines 9-12. In other words, Mackin may use OLE to implement some portion of the system discussed in Mackin. In other words, the system discussed in Mackin may interact with a user interface, for example, a keyboard or mouse. In contrast, Claim 1 recites "instructing, **from an external agent**, the first executable product to provide a file containing selected configuration data." Nothing in Mackin discloses or suggests that the instruction to create the file comes from an external agent. In fact, Mackin specifically recites throughout the specification that the system "**automatically**" transitions configuration settings from a source (old) computing system to a target (new) computing system. *See e.g.,* Mackin, column 4, lines 15-17: *see also,* Mackin, Title; Abstract; column 2, lines 46-55; and column 7, lines 12-14. Thus, Mackin specifically teaches away from waiting for an instruction from an external agent before creating the file containing the configuration data as recited in Amended Claim 1.

Accordingly, Independent Claims 1, 10, 18 and 19 are patentable over Mackin for at least the reasons discussed above. Furthermore, the dependent claims are patentable at least per the patentability of the independent base claims from which they depend.

Accordingly, independent Claims 1, 10, 18 and 19 are patentable over Mackin for at least the reasons discussed above. Furthermore, Appellants submit that the dependent claims are patentable at least per the patentability of the independent base claims from which they depend. Therefore, Appellants respectfully request reversal of the rejections with respect to Claims 1, 10, 18 and 19 and the claims that depend therefrom for at least the reasons discussed herein.

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B.   Dependent Claim 3 is Separately Patentable over the Cited Reference

As discussed above, the dependent claims are patentable at least per the patentability of the independent base claims from which they depend. Many of the dependent claims are also separately patentable over the cited reference.

As a preliminary note, the Office Action makes many statements that imply that certain aspects of the present invention are "inherent" or "common practice." *See e.g.*, Office Action, page 3, paragraph 5. Appellants would like to point out that Appellants disagree with the assertion in the Office Action that these aspects are inherent or commonplace even if not specifically addressed herein.

Claim 3 recites:

> The method of migrating configuration data according to Claim 1, further comprising:
> modifying the first executable product to respond to a command by **the external agent** to provide the selected configuration data in the format acceptable to the second executable product.

As discussed above with respect to Claim 1, nothing in Mackin discloses or suggests receipt of a command from an external agent as recited in, for example, Claim 1. Accordingly, it follows that nothing in Mackin discloses or suggests modifying the first executable product to respond to the command. Accordingly, Appellants submit that Claim 3 is separately patentable over the cited references and, therefore, the rejection of Claim 3 should be reversed for at least these additional reasons.

II.   The Section 103 Rejections

Claims 12, 13 and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mackin in view of United States Patent No. 5,969,704 to Green. Claims 4, 6, 21, 22 and 27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Mackin in view of United States Patent No. 6,757,720 to Weschler. Claims 5 and 23 stand rejected as being unpatentable over Mackin in view of Weschler and in further view of obviousness. As discussed above, the dependent claims are patentable at least per the patentability of the independent base claims from which they depend. Many of the dependent claims are also separately patentable.

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As a preliminary note, the Office Action makes many statements that imply that certain aspects of the present invention are "inherent" or "common practice." *See e.g.*, Office Action, page 3, paragraph 5. Appellants would like to point out that Appellants disagree with the assertion in the Office Action that these aspects are inherent or commonplace even if not specifically addressed herein.

A.   Dependent Claims 12, 13 and 17 are Separately Patentable over the Cited References

Claims 12, 13 and 17 recite wherein the external agent is a scripted command issued through execution of a batch file, wherein the external agent is a system scheduler that issues the command at a pre-determined time and wherein the internal control blocks were constructed using configuration files and command line parameters, respectively. The Office Action admits that Mackin fails to explicitly teach the aspects of the present invention as claimed in Claims 12, 13 and 17. *See* Office Action, pages 7 and 8. However, the Office Action states that Green provides the missing teachings.

Appellants respectfully submit there is no motivation or suggestion to combine the cited references as suggested in the Office Action. As affirmed by the Court of Appeals for the Federal Circuit in *In re Sang-su Lee*, a factual question of motivation is material to patentability, **and cannot be resolved on subjective belief and unknown authority**. *See In re Sang-su Lee*, 277 F.3d 1338 (Fed. Cir. 2002). It is improper, in determining whether a person of ordinary skill would have been led to this combination of references, simply to "[use] that which the inventor taught against its teacher." *W.L. Gore v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 U.S.P.Q. 303, 312-13 (Fed. Cir. 1983).

The Office Action states:

> Mackin and Green are analogous art because they are both concerned with the same field of endeavor, namely executable software on a computer apparatus. Therefore, it would have been obvious to someone of ordinary skill in the art, at the time the invention was made, to implement a batch file to perform Mackin's method wherein, the external agent is a scripted command issued through execution of a batch file. The motivation to do so was taught by Mackin's disclosure of the transition application programmers interface or (API), (Column 6, lines 38-51). Mackin further teaches scripted files and file system I/O, which also implies batch files (Column 8, lines 9-12).

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Thus, it would have been obvious to a person of skill in the art, to implement a scripted command by execution of a batch file.

See Office Action, page 7. This motivation is a motivation based on "subjective belief and unknown authority", the type of motivation that was rejected by the Federal Circuit in *In re Sang-su Lee*. In other words, the Office Action does not point to any specific portion of the cited references that would induce one of skill in the art to combine the cited references as suggested in the Office Action. If the motivation provided in the Office Action is adequate to sustain the Office's burden of motivation, then anything that is "in the same field of endeavor" would render a combination obvious. This cannot be the case. Accordingly, the statement in the Office Action with respect to motivation does not adequately address the issue of motivation to combine as discussed in *In re Sang-su Lee*. Thus, it appears that the Office Action gains its alleged impetus or suggestion to combine the cited references by hindsight reasoning informed by Applicants' disclosure, which, as noted above, is an inappropriate basis for combining references.

Furthermore, Mackin discusses a Method and System for Automatically Transitioning of Configuration Settings Among Computer Systems as recited in the title. Green, on the other hand, discusses a Configurable LED Matrix Display as recited in the title. Nothing in the cited references or the art itself would motivate a person of skill in the art to combine the configuration settings system of Mackin with the display of Green. Accordingly, Appellants submit that Claim 12, 13 and 17 are separately patentable over the cited references and, therefore, the rejection of Claims 12, 13 and 17 should be reversed for at least these additional reasons.

B.   **Dependent Claims 4, 6, 21 and 22 are Separately Patentable over the Cited References**

The Office Action admits that Mackin fails to explicitly teach the aspects of the present invention as claimed in Claims 4, 6, 21 and 22. *See* Office Action, pages 8-10. The Office Action further admits that Mackin and Weschler both fail to explicitly teach the aspects of the present invention as claimed in Claims 5 and 23. *See* Office Action, page 10. The Office Action offers the same types of motivations with respect to the combination of Mackin and Weschler as it does with respect to Mackin and Green. As discussed above, these types of motivations based

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on "subjective belief and unknown authority", are the types of motivations that were rejected by the Federal Circuit in *In re Sang-su Lee*. For example, if the motivation provided in the Office Action is adequate to sustain the Office's burden of motivation, then anything that would "enhance, override or overload basic functionality and behavior of an existing program" would render a combination obvious. *See* Office Action, page 9. This cannot be the case. Accordingly, the statement in the Office Action with respect to motivation does not adequately address the issue of motivation to combine as discussed in *In re Sang-su Lee*. Thus, it appears that the Office Action gains its alleged impetus or suggestion to combine the cited references by hindsight reasoning informed by Appellants' disclosure, which, as noted above, is an inappropriate basis for combining references. Accordingly, Appellants submit that Claims 4, 5, 6, 21, 22 and 23 are separately patentable over the cited references and, therefore, the rejection of Claims 4, 5, 6, 21, 22 and 23 should be reversed for at least these additional reasons.

C. Claims 29-31

Claims 29 through 31 are patentable over the cited references as none of the cited references appear to disclose or suggest the first executable product being OROUTED and the second executable product being OMPROUTE. Accordingly, Appellants submit that Claims 29-31 are separately patentable over the cited references and, therefore, the rejection of Claims 29-31 should be reversed for at least these additional reasons.

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V.   Conclusion

In light of the above, Appellants request reversal of the rejections of the claims, allowance of the claims and passing of the application to issue.

It is not believed that an extension of time and/or additional fee(s) are required, beyond those that may otherwise be provided for in documents accompanying this paper. In the event, however, that an extension of time is necessary to allow consideration of this paper, such an extension is hereby petitioned for under 37 C.F.R. §1.136(a). Any additional fees believed to be due in connection with this paper may be charged to Deposit Account No. 09-0461.

Respectfully submitted,

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APPENDIX A – CLAIMS APPENDIX

1. (Previously Presented) A method of migrating configuration data from a first executable product to a second executable product, the method comprising:

instructing, from an external agent, the first executable product to provide a file containing selected configuration data; and

producing, by the first executable product, the file containing the selected configuration data in a format acceptable to the second executable product.

2. (Previously Presented) The method of migrating configuration data according to Claim 1, further comprising:

reading the file by the second executable product; and

configuring the second executable product for operation using the selected configuration data contained in the file.

3. (Previously Presented) The method of migrating configuration data according to Claim 1, further comprising:

modifying the first executable product to respond to a command by the external agent to provide the selected configuration data in the format acceptable to the second executable product.

4. (Previously Presented) The method of migrating configuration data according to Claim 1, wherein instructing is accomplished by providing a parameter recognized by the first executable product.

5. (Original) The method of migrating configuration data according to Claim 4, wherein the parameter is recognized at initial startup of the first executable product.

6. (Original) The method of migrating configuration data according to Claim 4, wherein the parameter is recognized during normal operation of the first executable product.

7. (Previously Presented) The method of migrating configuration data according to Claim 1, further comprising:

modifying the file produced by the first executable product, wherein additional data is incorporated into the file for purposes of configuring the second executable product.

8. (Previously Presented) The method of migrating configuration data according to Claim 7, wherein modifying is performed by editing the file.

9. (Previously Presented) The method of migrating configuration data according to Claim 7, wherein modifying is performed by a third executable product.

10. (Previously Presented) A computer program product for migrating configuration data from a first executable code to a second executable code, the computer program product comprising:

computer readable storage medium having computer readable program code embodied in said medium, the computer readable program code comprising:

computer readable program code configured to receive a command from an external agent;

computer readable program code configured to obtain, responsive to the received command, configuration data available to the first executable code which is useful to the second executable code;

computer readable program code configured to arrange the data according to a format usable by the second executable code; and

computer readable program code configured to write the data to one or more external media for access by the second executable code.

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11. (Previously Presented) The computer program product according to Claim 10, wherein the external agent is a command issued from a computer terminal by a human operator.

12. (Previously Presented) The computer program product according to Claim 10, wherein the external agent is a scripted command issued through execution of a batch file.

13. (Previously Presented) The computer program product according to Claim 10, wherein the external agent is a system scheduler that issues the command at a pre-determined time.

14. (Previously Presented) The computer program product according to Claim 10, wherein the external media are persistent.

15. (Previously Presented) The computer program product according to Claim 14, wherein the external media comprise one or more disk files.

16. (Previously Presented) The computer program product according to Claim 10, wherein the data is obtained from one or more internal control blocks accessible by the first executable code.

17. (Previously Presented) The computer program product according to Claim 16, wherein the internal control blocks were constructed by the first executable code using configuration files and command line parameters.

18. (Previously Presented) A computer program product for migrating configuration data used by a first computer process to a second computer process requiring a set of data arranged in a format, the computer program product being embodied on one or more computer-readable media and comprising:

computer-readable program code configured to respond to a command presented by an external agent to produce a file according to the format, the file containing selected configuration

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data, the computer-readable program code configured to respond being contained in the first computer process;

computer-readable program code configured to output the file to a selected location, the computer-readable program code configured to output being contained in the first computer process; and

computer-readable program code configured to read the file from the selected location, the computer-readable program code configured to read being contained in the second computer process.

19.   (Previously Presented) A system for migrating configuration data, the system comprising:

a first executable product capable of providing a file containing selected configuration data arranged in a format responsive to a command from an external agent; and

a second executable product responsive to the format, wherein the second executable product accesses the file to obtain the configuration data.

20.   (Previously Presented) The system for migrating configuration data according to Claim 19, wherein the first executable product comprises:

means for receiving the command from the external agent;

means, responsive to the receiving of the command, for obtaining those configuration data available to the first executable product which are useful to the second executable product;

means for arranging the obtained data according to the format usable by the second executable product; and

means for writing the obtained data to one or more external media for access by the second executable product.

21.   (Previously Presented) The system for migrating configuration data according to Claim 19, wherein the configuration data is obtained from at least one internal table of the first executable product.

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22. (Original) The system for migrating configuration data according to Claim 19, wherein the configuration data is obtained from a configuration file.

23. (Original) The system for migrating configuration data according to Claim 19, wherein the configuration data is obtained in response to a startup parameter.

Claim 24 (Canceled).

25. (Previously Presented) The system for migrating configuration data according to Claim 19, wherein the second executable product is a replacement for the first executable product.

Claims 26-28 (Canceled).

29. (Previously Presented) The method of Claim 1, wherein the first executable product comprises OROUTED and the second executable product comprises OMPROUTE.

30. (Previously Presented) The computer program product of Claim 10, wherein the first executable code comprises OROUTED and the second executable code comprises OMPROUTE.

31. (Previously Presented) The system of Claim 19, wherein the first executable product comprises OROUTED and the second executable product comprises OMPROUTE.

APPENDIX B – EVIDENCE APPENDIX

(NONE)

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APPENDIX C – RELATED PROCEDINGS

(NONE)